

No. 15289

United States
Court of Appeals
for the Ninth Circuit

CASH DIVIDEND CHECK CORPORATION,

Appellant,

vs.

LEONARD F. DAVIS and WAYNE LAYTON,
Doing Business Under the Fictitious Firm
Name and Style of CASH SAVING CHECK
CORPORATION and CASH SAVING
CHECK CORPORATION,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED
DEC - 3 1956

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

LYON & LYON,
811 West Seventh Street,
Los Angeles 17, California.

For Appellee:

MILTON WILLIAM GORDON,
256 West Florence Avenue,
Los Angeles 3, California.

United States District Court, Southern District
of California, Central Division

Civil Action No. 18765-HW

CASH DIVIDEND CHECK CORPORATION, a
Corporation,

Plaintiff,

vs.

LEONARD F. DAVIS and WAYNE LAYTON,
Doing Business Under the Fictitious Firm
Name and Style of CASH SAVING CHECK
CORPORATION, CASH SAVING CHECK
CORPORATION,

Defendants.

COMPLAINT FOR INFRINGEMENT OF REG-
ISTERED COPYRIGHT AND UNFAIR
COMPETITION

Now comes the plaintiff and for cause of action
against the defendants, and each of them, alleges
as follows:

I.

That the plaintiff is now and at all times alleged
herein was a corporation organized and existing
under and by virtue of the laws of the State of
Colorado, and having its principal place of business
in Denver, Colorado.

II.

That the defendants Leonard F. Davis and
Wayne Layton are residents of the Southern Dis-
trict of California, Central Division, Leonard F.
Davis residing in Long Beach, California, and

Wayne Layton residing in Lynwood, California; that the [2*] defendants are doing business under the fictitious firm name and style of Cash Saving Check Corporation at 3425 Firestone Boulevard, South Gate, California, within the Southern District of California, Central Division; that the acts of copyright infringement and unfair competition complained of herein were committed by said defendants, and each of them, within said District.

III.

The Court has jurisdiction of the subject matter and of the parties by virtue of §§1338(a) and (b), 1400(a) and of §1332(a)(1), of Title 28 United States Code.

IV.

That prior to February 10, 1934, W. V. Mathews, who then was a citizen of the United States and an employee of plaintiff corporation, created and wrote for said plaintiff corporation an original book entitled "Cash Dividend Check Pay to the Order of."

V.

That said book contains a large amount of material wholly original with the author and is copyrightable subject matter under the Copyright Laws of the United States.

VI.

That between February 10, 1934, and February 15, 1934, plaintiff compiled in all respects with the Copyright Act of March 4, 1909, as amended by

*Page numbering appearing at foot of page of original Certified Transcript of Record.

the Act approved March 2, 1913, and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of said book and received from the Register of Copyrights a certificate of registration dated and identified as follows: "February 15, 1934, Class AA 139152."

VII.

That since February 15, 1934, said book has been published [3] by plaintiff and all copies of it made by plaintiff or under its authority or license have been printed, bound and licensed in strict conformity with the provisions of the Act of March 4, 1909, as amended by the Act approved March 2, 1913, and all other laws governing copyright.

VIII.

That since February 15, 1934, plaintiff has been and still is the sole proprietor of all right, title and interest in and to the copyright in said book and in and to the registration therefor and thereon.

IX.

That within six years last past and prior to the filing of this complaint, the defendants Leonard F. Davis and Wayne Layton have caused to be published and placed upon the market a book entitled "Cash Saving Check" which was copied largely from plaintiff's book "Cash Dividend Check Pay to the Order of"; that the Cash Saving Check Corporation placed said books upon the market and the defendants, Leonard F. Davis and Wayne Lay-

ton actively participated therein and have directed and controlled said operations; that the activities of said defendants, and each of them, constitute infringement of plaintiff's registered copyright and said defendants are jointly and severally liable for said infringement.

X.

That a photostatic copy of plaintiff's registered copyrighted book is attached hereto as Exhibit 1; that a photostatic copy of the infringing book published by defendants Leonard F. Davis and Wayne Layton, doing business under the name and style of Cash Saving Check Corporation is attached hereto as Exhibit 2; that a photostatic copy of the Certificate of Registration covering plaintiff's copyright is attached hereto as Exhibit 3. [4]

XI.

That said defendants are fully aware that the plaintiff and licensed distributors thereof are endeavoring to publish their copyright and to make use of the same within the same territory within which the defendants are conducting their activities; that said action of the defendants has caused great damage and injury to the plaintiff for which there is no adequate remedy at law; that said defendants have wilfully infringed upon the registered copyright of the plaintiff and with full knowledge of plaintiff's copyright and of its activities in utilizing said copyright in its money saving plan and have thereby aggravated said copyright infringement and unfairly competed with plaintiff.

Wherefore, plaintiff prays:

1. That the defendants, and each of them, their agents and servants, be enjoined during the pendency of this action and permanently from infringing said copyright of said plaintiff in any manner and from publishing, selling, marketing or otherwise disposing of any copies of the copyrighted work entitled "Cash Dividend Check Pay to the Order of."

2. That defendants, and each of them, their agents and servants, be enjoined during the pendency of this action and permanently from the unfair practices and acts of unfair competition complained of.

3. That defendants, and each of them, be required to pay to plaintiff such damages as plaintiff has sustained in consequence of defendant's infringement of said copyright and said unfair trade practices and said unfair competition and to account for:

(a) All gains, profits and advantages derived by [5] defendants, and each of them, by said unfair trade practices and unfair competition; and

(b) All gains, profits and advantages derived by defendants, and each of them, by their infringement of plaintiff's copyright, or such damages as to the Court shall appear proper within the provisions of the Copyright Statutes.

4. That defendants, and each of them, be required to deliver up to be impounded during the pendency of this action all copies of said copyrighted work, as exemplified by Exhibit 2 hereto, in their possession or under their control and to deliver up for destruction all infringing copies and all plates, molds and other matter for making such infringing copies.

5. That defendants, and each of them, pay to plaintiff the cost of this action and reasonable attorneys' fees to be allowed to the plaintiff by the Court.

6. That the judgment entered in favor of plaintiff be trebled because of the wilful nature of the copyright infringement.

7. That plaintiff have such other and further relief as is just.

Dated: This 16th day of September, 1955.

/s/ LEONARD J. LYON,

/s/ R. E. CAUGHEY,

Attorneys for Plaintiff. [6]

1952

CASH DIVIDEND CHECK CORPORATION

OF DENVER, COLORADO

Series 524,280

Upon proper presentation

Pay to the
Order of

THE INDIVIDUAL TO WHOM ISSUED MUST PLAINLY SIGN HIS OR HER NAME ON THIS LINE

ONE DOLLAR & No/100

\$1.00

DEPOSITORY

The Central Bank & Trust Co.
Denver, Colorado

CASH DIVIDEND CHECK CORPORATION



COPYRIGHT 1934, CASH DIVIDEND CHECK CORPORATION - DENVER, COLO. COPYRIGHT 22A-139-132

ENDORSEMENTS

The first endorsement below must agree with the signature on the face of check.

Authorized Dealer

The dealer issuing this check must stamp registered name and address of his firm in this space.

Proper Presentation

This CHECK is valid ONLY when 100 Cash Dividend Stamps are attached to spaces provided inside. Check may be cashed at any authorized dealer or your local bank.

VOID

Cash Dividend Checks are Void if not presented for redemption within two (2) years from January 2nd of the year printed on the face of check.

PUT ONE STAMP IN EACH SPACE

AUTHORIZED DEALERS

OLNEY, ILLINOIS

WELAND-GOUDY HARDWARE
Every Hardware Need
224 E. Main Phone 129

OLNEY FLOWER SHOP & GREENHOUSE

Say it with Flowers
301 E. Main Phone 1075
367 N. West Phone 131W

FEHRENBACHER'S SERVICE STA.
Phillips 66 Products
629 W. Main Phone 786

ANDERSON'S GIFT SHOP
Gifts for all Occasions
114 White Phone 974

QUAYLE'S IGA SUPER MARKET
Quality Groceries & Meats
401 N. East St. Phone 282W

EALY'S JEWELRY
First in Fine Jewelry
211 E. Main Phone 270R

TINY TOT SHOP
Supplies for Tot and Teenable
215 E. Main Phone 1051

VAN'S
Appliances - Sporting Goods
Electrical Supplies
204 E. Main Phone 320

ESQUIRE MEN'S SHOP
The Store for Men
222 E. Main Phone 11

BARNES 66 SERVICE STATION
Phillips 66 Products
501 White Phone 233W

PUT ONE STAMP IN EACH SPACE

THE MONEY SAVINGS SYSTEM

This CHECK is worth \$1.00 in CASH to you when 100 CASH DIVIDEND STAMPS are attached to it. You may cash it at any store authorized to use this MONEY SAVINGS SYSTEM, or at your local Bank. You may obtain the Stamps at the rate of 2 for each dollar's worth of Purchases, and your local merchant who offers you this opportunity to save should be patronized. Remember, buying where you get CASH DIVIDEND CHECKS is like putting money into the Savings Bank. Ask your favorite merchants in all lines of business to install this MONEY SAVINGS SYSTEM so that you may obtain these savings on all your Cash purchases.

87 Stamps from all stores displaying the Cash Dividend Sign may be placed on this Check

CASH DIVIDEND CHECK CORPORATION
1622 Arapahoe St., Denver 2, Colo.

SHERMANS

Olney's Finest Dept. Store
202 E. Main Phone 134

OLNEY CLEANERS
Cleaning and Dyeing

410 E. Main Phone 484

LaRUTH SHOP

The Store for Women
Arcade Building Phone 183

BOWER'S DRUG STORE

Walgreen Agency
Walter Forney, Prop.
209 E. Main Phone 130



CASH SAVING CHECK

NO. 1989
1222

Series 55

1955

Upon proper presentation

PAY TO THE
ORDER OF

\$1.00

THE INDIVIDUAL TO WHOM ISSUED MUST PLAINLY SIGN HIS OR HER NAME ON THIS LINE

ONE DOLLAR & NO/100

DEPOSITORY

CALIFORNIA-TWENTY BRANCH

90-1592
1222

Bank of America

NATIONAL EXCHANGE ASSOCIATION
9037 CALIFORNIA AVENUE
SOUTH GATE, CALIFORNIA

CASH SAVING CHECK CORPORATION

Wm. J. Davis

Proper Presentation

This CHECK is valid ONLY when 100 Cash Saving Stamps are attached to spaces provided inside and the issuing dealer's name and address are placed herein by him.

ENDORSEMENTS

The first endorsement below must agree with the signature on the face of check.

NAME _____
STREET _____
CITY _____
TELEPHONE _____

Authorized Dealer

DAVIS MARKET
3450 FIRST ST. BLD.
SOUTH GATE, CALIFORNIA

VOID

Cash Saving Checks are Void if not presented for payment within two (2) years from January 2nd of the year printed on the face of check.

PUT ONE STAMP IN EACH SPACE

PLACE 10 STAMPS ON THIS PAGE

You will receive One CASH SAVING STAMP for each 50¢ purchase at any of the merchants listed below. When 100 CASH SAVING STAMPS are attached to this check it will be worth \$1.00 in CASH. You may cash it at any merchant listed below or at the Bank. The money is held by the Bank of America of South Gate to guarantee each payment. When the check is filled, you can get CASH immediately.

Ray Retail Merchant wanting information on the Cash Saving Check Plan call
LOrain 9-460 or LOrain 7-1333

OK Baby Shop

25% OFF ON BABY FURNITURE
WE BUY, SELL AND RENT

8644 S. Gate Street LO 7-4558 or LO 7-4229

Brad's Bike Shop

POWER and HAND LAWNMOWERS and EDGERS
SALES and SERVICE

LOrain 7-5927

Household Hardware & Paint Co.

9-8-12 to 12-12-12

LOrain 7-3155 8102 California Ave.

Buck's Union Oil Service

3400 Firestone Blvd. at California

Phone LO 9-784

Western Motor Rebuilders

COMPLETE AUTO PARTS
Automotive Machine Shop 8126 S. Gate Street

Bill's Quality Meats

FEATURING BUCETTI BARY BEEF

We Cut and Package for Your Home Freezer
LO 9-6020 in Davis Market

Firestone Pottery & Gift Shop

Over 40 Different Patterns in Dishes
Over 5,000 Items in Gifts

LO 7-3374 3400 Firestone Blvd.

Turnball Bros. Paint Store

Color Matching... Wall Paper in Stock... Paints

LOrain 7-6315 2033 South Atlantic

Martin's Cleaning Plant

BETTER CLEANERS SINCE 1927

LO 7-5444 2217 Liberty Blvd.

Parsons Pharmacy

3448 S. Gate Street

LOrain 7-4812

Hours 10 to 8

LO 7-1296

Martin's

RADIO CENTER

TV SERVICE

8415 S. Gate Street

Layton Rents

3425 Firestone Blvd. 1420 Atlantic Blvd.

LO 7-1953

OPEN UNTIL MIDNIGHT

Davis Market

BIGGEST LITTLE SUPER MARKET IN TOWN
LO 9-6000 3400 Firestone Blvd.

PLACE 10 STAMPS ON THIS PAGE

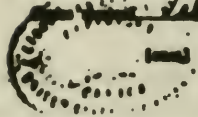
PLACE 10 STAMPS ON THIS PAGE

Exhibit 3

Cash Dividend Check Corporation
Henry. J. Co.
 Date of issue: Cash Dividend Check
Pay to the order of -
By H. H. Matsumoto

Author, of the United States

Date of publication: Feb. 10, 1904 ADAMANT received Feb. 12, 1904
Feb. 12, 1904. Entry: Class AA, No. 139152



W. H. Brown
 Acting Register of Copyrights

U. S. GOVERNMENT PRINTING OFFICE: 1903

AA

LIBRARY OF CONGRESS
 COPYRIGHT OFFICE OF THE UNITED STATES OF AMERICA
 WASHINGTON

CERTIFICATE OF COPYRIGHT REGISTRATION

This is to certify, in conformity with section 35 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, as amended by the Act approved March 2, 1911, that TWO copies of the BOOK named herein have been deposited in this Office under the provisions of the Act of 1909, together with the AFFIDAVIT prescribed in section 16 thereof; and that registration of a claim to copyright for the first term of 28 years from the date of publication of said book has been duly made in the name of

(over)

Endorsed: Filed September 16, 1955.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Come now, defendants Leonard F. Davis and Wayne Layton sued herein as Leonard F. Davis and Wayne Layton, doing business under the fictitious firm name and style of Cash Saving Check Corporation, and answering plaintiff's complaint, admit, deny and allege as follows:

I.

Defendants do not have any information upon which to form any belief concerning the allegations of paragraph I of plaintiff's complaint and upon that ground they deny each, every, and all of the allegations therein contained.

II.

Answering paragraph II, defendants admit that they are residents of the Southern District of California, Central [10] Division, and that Leonard F. Davis resides in Long Beach, California, and Wayne Layton resides in Lynwood, California. Except as herein specifically admitted, defendants deny each, every and all of the allegations of said paragraph II.

III.

Defendants do not have sufficient information to form any belief concerning the allegations of paragraphs IV, V, VI, VII, and VIII of the complaint. and upon that ground deny each, every, and all of the allegations therein contained.

IV.

Answering paragraph IX, defendants admit that the Cash Saving Check Corporation placed with merchants in the City of South Gate, California, cash saving checks and that defendants Leonard F. Davis and Wayne Layton participated in the said placement of cash saving checks. Except as herein specifically admitted, defendants deny generally and specifically, in the singular and in the conjunctive, each, every, and all of the allegations contained in said paragraph IX.

V.

Answering paragraph X, defendants admit that the cash saving check which was placed with merchants at South Gate, California, by the Cash Saving Check Corporation was for a short period of time, to wit, no more than two (2) months, in the form as set forth in plaintiff's complaint as Exhibit 2 thereof. Defendants do not have any information concerning the remainder of the allegations of said paragraph X, and upon that ground deny all thereof except that which they have herein specifically admitted.

VI.

Answering paragraph XI, defendants deny generally and specifically, in the singular and in the conjunctive, each, [11] every, and all of the allegations therein contained, and deny further that plaintiff has been damaged or injured in any manner by reason of the actions of these answering defendants. Further answering paragraph XI, de-

endants further allege that if defendants have infringed upon the copyright of plaintiff, the said infringement was not wilfull.

Wherefore, defendants pray that the complaint be dismissed, that they be awarded their costs, and for all proper relief.

Dated: This 24th day of January, 1956.

/s/ MILTON WILLIAM GORDON,
Attorney for Defendants.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed January 31, 1956. [12]

United States District Court, Southern District of
California, Central Division

Civil Action No. 18765-HW

CASH DIVIDEND CHECK CORPORATION, a
Corporation,

Plaintiff,

vs.

LEONARD F. DAVIS and WAYNE LAYTON,
Doing Business Under the Fictitious Firm
Name and Style of CASH SAVING CHECK
CORPORATION,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW AND JUDGMENT

This cause came on for trial, and the Court having heard the evidence and considered the stipula-

tion of the parties, finds the facts and states the conclusions of law as follows:

Findings of Fact

I.

That the plaintiff is now and at all times alleged in the complaint was a corporation organized and existing under and by virtue of the laws of the State of Colorado, and having its principal place of business in Denver, Colorado.

II.

That the defendants are residents of the Southern District of California, Central Division; that defendants and the defendant Cash Saving Check Corporation are doing business at [14] 3425 Firestone Boulevard, South Gate, California, within the Southern District of California, Central Division.

III.

That the Court has jurisdiction of the subject matter and of the parties.

IV.

That prior to February 10, 1934, W. V. Mathews was the author of that certain work entitled "Cash Dividend Check Pay to the Order of" as exemplified by Exhibit 1 to the complaint filed herein; that said work was published on February 10, 1934, and bore thereon the notice of copyright required by Section 19 of Title 17 of the United States Code; that subsequent to publication the plaintiff made

application for copyright registration of said work and received a certificate of registration therefor issued by the Register of Copyrights on February 15, 1934; that the parties in open court stipulated to the issuance of said certificate of registration and that Exhibit 3 to the complaint is a photostatic copy thereof.

V.

That the work exemplified by plaintiff's Exhibit 1 to the complaint is not subject matter which can be covered by a statutory copyright pursuant to the provisions of Section 10 of Title 17 of the United States Code.

VI.

That subsequent to February 15, 1934, plaintiff has continued to publish the work exemplified by Exhibit 1 to the complaint and plaintiff is the sole proprietor of all of the right, title and interest in and to said work and in and to the purported copyright for which the Register of Copyrights issued the registration exemplified by plaintiff's Exhibit 3 to the complaint. [15]

VII.

That the defendants, Leonard F. Davis and Wayne Layton, doing business under the fictitious firm name and style of Cash Saving Check Corporation, and their successor in interest Cash Saving Check Corporation, a California corporation, have distributed a work entitled "Cash Saving Check" as exemplified by Exhibit 2 to the com-

plaint which was copied from the work of plaintiff as exemplified by Exhibit 1 to the complaint.

VIII.

That the photostatic copies attached to the complaint as Exhibits 1, 2, and 3 have been stipulated by the parties as true and correct copies of their originals and shall be considered with the same force and effect as the originals.

IX.

That the said action of defendants have not caused any damage or injury to plaintiff.

Dated: This 6th day of August, 1956.

/s/ HARRY C. WESTOVER,

United States District Judge.

Conclusions of Law

I.

That plaintiff's original writing of "Cash Dividend Check Pay to the Order of" is not copyrightable subject matter under copyright laws of the United States, and that plaintiff does not have the sole and exclusive rights or privileges to the publication thereof.

II.

That the complaint must be dismissed.

It Is So Ordered, and counsel for defendants will submit appropriate judgment in accordance herewith.

Dated: This 6th day of August, 1956.

/s/ HARRY C. WESTOVER,
United States District Judge.

Judgment

This cause having come on to be heard and the issues having been regularly brought on for trial before Honorable Harry C. Westover, Judge presiding, without a jury, the parties having appeared by their respective counsel and the issues having been duly tried, and having been considered by this Court upon the pleadings and evidence presented on trial and upon the briefs by counsel for the parties, and upon the findings of fact and conclusions of law set forth in the open file in this Court on the day of, 1956, it is

Ordered, Adjudged, and Decreed:

(1) That the work exemplified by Exhibit 1 to the complaint and relied upon by the plaintiff as a statutory copyright upon which registration has been secured, as exemplified by Exhibit 3 to the complaint is not a valid copyright under the provisions of Section 10 of Title 17 of the United States Code and under the copyright laws of the United States.

(2) That the complaint of plaintiff herein be dismissed on its merits.

Dated: This 6th day of August, 1956.

/s/ HARRY C. WESTOVER,

United States District Judge.

Approved as to form:

LYON & LYON,

By /s/ R. DOUGLAS LYON,

Attorneys for Plaintiff.

Lodged August 6, 1955.

[Endorsed]: Filed, docketed and entered August 6, 1956. [18]

[Title of District Court and Cause.]

NOTICE OF APPEAL

The plaintiff, Cash Dividend Check Corporation, in the above-entitled action, hereby appeals to the Court of Appeals for the Ninth Circuit from the Judgment entered in the above-entitled action on August 6th, 1956, and from each and every part thereof.

LYON & LYON,

/s/ R. E. CAUGHEY,

Attorneys for Plaintiff-
Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed August 7, 1956. [19]

[Title of District Court and Cause.]

ORDER

This cause having come before the Court to be heard upon the motion of Plaintiff-Appellant,

It Is Hereby Ordered:

That the time for the filing of the record on the appeal and docketing of the appeal taken in the above-entitled case be and hereby is extended from September 17, 1956, to and including October 17, 1956, which is less than ninety (90) days from date the Notice of Appeal was filed.

Dated September 14, 1956.

/s/ HARRY C. WESTOVER,
United States District Judge.

[Endorsed]: Filed September 14, 1956. [26]

In the United States District Court, Southern
District of California, Central Division

No. 18765-HW

CASH DIVIDEND CHECK CORPORATION,
Plaintiff,

vs.

LEONARD F. DAVIS and WAYNE LAYTON,
etc.,

Defendants.

Honorable Harry C. Westover, Judge Presiding:

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Thursday, June 7, 1956

Appearances:

For the Plaintiff:

LYON & LYON, by
R. E. CAUGHEY, ESQ.

For the Defendants:

MILTON WILLIAM GORDON, ESQ.

Thursday, June 7, 1956—10:00 A.M.

The Clerk: No. 18765-HW Civil, Cash Dividend Check Corporation vs. Leonard F. Davis, et al., trial.

Mr. Caughey: Ready for the plaintiff, your Honor.

Mr. Gordon: Ready for the defendant, your Honor.

The Court: You may proceed. I have read your pleadings and read your pretrial memorandum. You can go ahead. I think I know what the issues are in this case.

Mr. Caughey: Just a brief statement, your Honor?

The Court: All right.

Mr. Caughey: As your Honor knows from reading the pleadings and the memorandum, this is a copyright case under the Copyright Law of the United States. The particular copyright is under the

first section of Section 5, the first subdivision of Section 5, book classification.

This particular classification is, as your Honor probably knows, a catch-all classification in the Copyright Office where they put everything else that isn't covered by the succeeding classifications. So, therefore, although this is to be designated a book as far as the copyright laws are concerned, I think it might more properly be designated as an expression of intellectual effort, where you have an expression, because there are different things that are covered by that classification, such as accounting forms, various and sundry [3*] things which are, although generally classified as a book, are not what you would ordinarily classify as a book. However, they are expression of intellectual effort.

Now, when we consider a copyright, many of the cases state that originality is necessary. There are some cases to the effect that originality is not necessary insofar as certain——

The Court: Now, you are arguing the law in this case. Let's find out what the facts are.

Mr. Caughey: No, I am not arguing the law. I want to focus your Honor's attention to this fact. I want to make my point, that there is originality in this case. This is a case where we do have, not only originality, but we have, as the evidence will show, something that is actually new. Not only have we originality, therefore, but this is actually new, as the evidence will show, because this particular form

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

of what I will call basically a check, is something that had never been used before the particular purpose for which it was used.

The Court: Your statement is not evidence in this case. If you just call your witnesses and let the witnesses testify, we will find out about this case.

Mr. Caughey: All right, sir, if that is what you wish.

The Court: Call your first witness. [4]

Mr. Caughey: Mr. Gordon.

BERT GORDON

called as a witness by and on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Bert Gordon, G-o-r-d-o-n.

Direct Examination

By Mr. Caughey:

Q. Would you please state your name?

A. My name is Bert Gordon.

Q. Where do you reside?

A. I reside in Denver, Colorado.

Q. What association, if any, do you have with the plaintiff in this action?

A. I am the president of the Cash Dividend Check Corporation.

Q. How long have you been president of that corporation? A. Since 1952.

Q. Have you any other business, Mr. Gordon?

(Testimony of Bert Gordon.)

A. Yes.

Q. What is it?

A. I am the president of the Gordon Stores Co., Inc., [5]

Q. And that operates where?

A. We have a small chain of department stores in three states. There are 11 stores.

Q. In the West?

A. Colorado, Texas, and New Mexico.

Q. When did you become associated with the Cash Dividend Check Corporation, the plaintiff?

A. In 1951.

Q. Would you state the factors that caused you to become associated with that concern?

A. Perhaps I misinterpreted you. I became associated with the Cash Dividend Check Corporation as of February 1, 1952. I believe it was at the time that our group acquired control of the voting stock of the Cash Dividend Check Corporation.

Q. Had you had some contact with the corporation prior to that time? A. Yes.

Q. Would you state what that was?

A. In 1951, one of their representatives called at our office in Denver and presented this very unique and original, what we will call a stamp plan, and we were very much taken with its copyrighted cash dividend check. We saw certain features in it which we had never been exposed to before. We had investigated at times various stamp plans, but nothing ever appealed [6] to us such as this.

We tried it in our Leadville, Colorado, store first.

(Testimony of Bert Gordon.)

We had such an outstanding result with its usage that we checked into the company and found that it could be purchased, and then we arranged for the purchase of the outstanding stock of the company.

Q. You are using it in the stores since that time? Have you continued to use it? A. Yes.

Q. With success, Mr. Gordon?

A. Yes, sir.

Q. When you say success, what was the nature of the success? Did it increase the sales, or what?

A. In our first experience, we had over a 40 per cent increase in our volume within the first six months of its usage. Subsequent history has varied somewhat near that figure, I would say.

Q. As I understand you, this success in your own stores caused you to take over control, purchase control of the plaintiff corporation, is that correct?

A. Yes, sir.

Q. Since you and your group took control of the corporation in 1952, what, if anything, have you done insofar as the exploitation of the copyright here involved is concerned?

A. We have been spreading into various other states. [7] We are operating in California, Colorado, Montana, Texas, Oklahoma, Michigan, Illinois, Missouri, and so forth, in our process of national development.

Q. In what manner have you exploited this particular copyright? Have you licensed or franchised others, or just how have you carried on the business?

(Testimony of Bert Gordon.)

A. As a general principle, we have licensed distributors in various regions, geographical regions. Under this licensing arrangement they pay a royalty fee to us for the use of the copyright.

Q. Have you a distributor in Southern California, or licensee? A. Yes, sir.

Q. What is their name?

A. Their corporation is known as Check System, Incorporated.

Q. Who is the party who is the foremost man in that corporation, do you know?

A. Mr. Earl W. Beebe.

Q. Are they operating in Southern California?

A. Yes, sir.

Q. Within the territory of South Gate and vicinity? A. Yes, sir.

Q. You testified that you purchased control of the corporation. It is a corporation, is it? [8]

A. Yes, sir.

Q. And a corporation of what state?

A. The state of Colorado.

Mr. Caughey: May your Honor please, in the pleadings there was a denial made for lack of information and belief that this was a corporation. If Mr. Gordon——

Mr. Gordon: I will stipulate, your Honor.

Mr. Caughey: I have a certified copy available. With the stipulation, it is not necessary to use that.

Q. I show you a check, Mr. Gordon, which I will call a check, entitled Cash Dividend Check Corpo-

(Testimony of Bert Gordon.)

ration on the top, and ask you to look at the same and ask you if you can identify it?

A. Yes, sir. I can identify this. It is the property of our corporation.

Q. That is a cancelled check? A. Yes, sir.

Q. One that has gone through the bank, is that right? A. Yes, sir.

Q. Would you state whether or not that is or is not a negotiable instrument as it is there?

A. As it is here, yes, sir.

Q. What did you have to do insofar as your relationship with the bank or other concerns to make that a negotiable instrument? What did you have to do? [9]

Did you have to make arrangements with the bank or what? A. Yes, sir.

Mr. Gordon: If your Honor please, I will object on the grounds that the instrument speaks for itself. It contains negotiable words and it certainly is in the form of a negotiable instrument.

The Court: You are not denying it is negotiable?

Mr. Gordon: That's right. It is negotiable.

The Court: I will sustain the objection. He agrees it is negotiable.

Mr. Caughey: That's all right. That is what I wanted to establish.

Q. This is a cancelled check which came from the files of the corporation, is that correct?

A. Yes, sir.

Mr. Caughey: I will ask that the cancelled check identified by the witness be admitted in evidence.

(Testimony of Bert Gordon.)

The Court: It may be received in evidence.

The Clerk: Exhibit 1.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 1.)

Mr. Caughey: There was also a denial made in the pleading, may your Honor please, for lack of information and belief, as to the certificate of registration secured, the [10] copyright certificate secured. Is Mr. Davis making any point of that?

Mr. Gordon: No. For the purpose of saving time, we will stipulate there was an application made and a certificate rendered by the Copyright Office as set forth in the complaint.

Mr. Caughey: Thank you.

Q. Now, this copyrighted, we will call it a check, that your corporation is exploiting, Mr. Gordon, has it been in the form of Exhibit 1 since your group took over the corporation? A. Yes, sir.

Q. Was that the form which was presented to you at the time your group took over the corporation? A. Yes, sir.

Mr. Gordon: To that I will object, your Honor, as the original form would be the best evidence.

The Court: Overruled. Aren't you stipulating that—

When you filed for your copyright, did you file a form of the check?

Mr. Caughey: Oh, yes. That is shown on the cer-

(Testimony of Bert Gordon.)

tificate of registration, that the copies were received. The date of receipt is shown.

The Court: And is this the form?

Mr. Caughey: Yes, sir.

The Court: That was presented? [11]

Mr. Caughey: Yes, sir.

The Court: Objection overruled.

Mr. Gordon: If your Honor please, I would like to point out to the court that the form which is being presented to the court bears the year 1952 thereon. The copyright was applied for in 1934, and we are very much concerned as to whether or not the original was the same as this 1952 check which has been presented as an exhibit in the complaint.

The Court: This witness says it is the same.

Mr. Caughey: May your Honor please, of course——

The Court: If that was an issue, you could very easily have discovered what the original form was.

Mr. Gordon: We have attempted to. We have written to the United States Patent Office and the Copyright Office and received a letter back from the office which stated that their records show that both copies of this work were returned to the claimant March 3, 1934, so we had no way of knowing what the original looked like.

Mr. Caughey: Of course, the year was changed from time to time, because you redeem them in a specific year, but that is the only change made.

The Court: Objection overruled. If the defendant had any question, I think the defendant could

(Testimony of Bert Gordon.)

have found out by the use of discovery proceedings and looked at the original check, if the original check was available. [12]

Mr. Gordon: All right.

The Court: This witness says they were the same and I will take the witness' testimony until you can show me to the contrary.

Mr. Gordon: Yes, your Honor.

The Court: The depository has always been the Central Bank & Trust Company, of Denver, Colorado?

The Witness: Yes, sir, in that region.

The Court: I assume that these checks were given out to the various customers and they obtained these stamps from the places of business where they do business, and after obtaining the stamps, they put the stamps on the back of the check, and when they get a hundred stamps on the back of the check, then they can cash the check for a dollar?

The Witness: Yes, sir.

The Court: All right.

Q. (By Mr. Caughey): In your testimony, you referred to the fact that you had previously considered other stamps or use of other stamps.

A. Yes.

Q. Had you any one particular stamp in mind you had considered prior to getting into this plaintiff corporation?

A. Yes, sir. The largest stamp company in the United States, I believe, is Sperry and Hutchinson

(Testimony of Bert Gordon.)

Company, S & H Green Stamps. They have had a man calling on our firm for over [13] 25 years trying to sell us.

Q. Are you familiar with the method that they use? A. Yes, sir.

Q. In utilizing their stamps? A. Yes, sir.

Q. Would you briefly state it to the court?

A. Yes, sir. You purchase stamps from them and then you hand them out at the rate of one for each 10-cent purchase from your customer. In other words, if a customer bought \$1.00 worth of merchandise, you would give 10 stamps. The customer in turn accumulates these stamps and pastes them into a little booklet, and then they take the booklet to a redemption center that is owned by S & H Green Stamp Company, and for so many books of stamps, they are entitled to receive various forms of premiums, such as toasters, lamps, and many and various sundry items.

Q. The stamps which the court referred to in questioning you, are those stamps which are furnished by your corporation? A. Yes, sir.

Q. For the purpose of applying them to the back of the check? A. Yes, sir.

The Court: You sell these stamps to the merchants?

The Witness: Yes, sir, and provide them with these—— [14]

The Court: With the blank checks?

The Witness: Yes, sir.

The Court: All right.

(Testimony of Bert Gordon.)

Q. (By Mr. Caughey): Now, have you found it is necessary in some states, in order to comply with the provisions of the corporation laws, the laws of the various states, to secure permits to do business under this particular way of doing business?

A. Yes, sir.

Q. How about the State of California?

A. Yes, sir, very decidedly in this state.

Q. In other words, the State of California takes the position it is necessary to secure a permit to do business as you are doing it in exploiting this particular copyright?

A. Yes, sir. We first registered with the state and then we later formed a separate corporation in the state, and also the Commissioner of Corporations ruled that a certain statute was in force that requires any company issuing stamps with cash value, in which the public receives cash, you have to qualify with the Commissioner of Corporations under the Securities Act, and we therefore had to secure a permit from the Commissioner of Corporations, and we pay a fee, as a matter of fact, for each stamp that we dispense in the state.

Mr. Caughey: May your Honor please, I have the permit available, and exhibiting it to Mr. Gordon might be all [15] that is necessary.

I just want to show we have complied with the laws of the state, so there won't be any question.

Mr. Gordon: May I see it?

(Mr. Caughey handing document to Mr. Gordon.)

(Testimony of Bert Gordon.)

Mr. Caughey: It may be that Mr. Gordon's clients have also done this to show that they carry on similar business.

Mr. Gordon: I will stipulate, your Honor, that the plaintiff has complied with the laws of the State of California with regard to incorporation and the distribution of its securities.

Mr. Caughey: Thank you.

Q. Mr. Gordon, you mentioned a number of states in which the copyright is being exploited. Is this a constant expanding of your business? Have you plans to expand it to other states? Is that the procedure?

A. Yes, sir, with a normal growth pattern.

Q. Is this a substantial business, Mr. Gordon, that is being carried on by the corporation?

A. Yes.

Q. Can you give some idea of the business so that the court may have some idea of what is involved here, particularly on the question of damages? I think the court has the power to assess whatever damages he sees fit in a copyright [16] case.

A. Yes. It is becoming a very large business. For example, the volume used, for example, in dollars and cents volume, we have one account here in Southern California that is over—almost \$400,000 a year for our stamps, just one firm with seven stores.

Naturally, of course, grocers' volume is the largest. We surround grocers with other small accounts, supporting accounts.

It has been our custom to print the names of the

(Testimony of Bert Gordon.)

various dealers on some of the blank area on the check to show the customers where they may shop and get these cash dividend stamps.

Q. That is, you print the name on the back of the check in the place where the stamps are applied so that they are covered by the stamp when they apply the stamp?

A. They don't cover up the squares, sir. When the stamps are affixed to the inside, of course, it covers up all legends and names.

The Court: When did you first come to California?

The Witness: 1953, sir, I believe.

Q. (By Mr. Caughey): 1953?

A. Or 1952. It may have been in the latter part of 1952 or early part of 1953. I am not just sure.

Q. Are you familiar with the location in which the defendants are doing business, the defendants in this action?

A. Well, I am from Denver, sir. I am not exactly sure, but I know it is within the Southern California territory that is franchised out to this Check System.

Q. Have the activities of the defendants, to your knowledge, interfered with the exploitation of your copyright within this territory? A. Yes, sir.

Mr. Gordon: If your Honor please, I believe that asks for a conclusion of the witness.

The Court: Sustained.

Q. (By Mr. Caughey): Is your licensee doing business in the same territory within which the de-

(Testimony of Bert Gordon.)

defendant is doing business? A. Yes, sir.

Mr. Caughey: I believe that's all of this witness, your Honor please.

The Court: Cross-examine.

Cross-Examination

By Mr. Gordon:

Q. Mr. Gordon, prior to the time you say you took an active participation in the plaintiff corporation, you had been approached by other dealers in stamp plans, is that correct? [18]

A. Yes, sir.

Q. So that the stamp plan is not a unique idea, is it? I mean there were others who were using the stamp plan.

A. I don't quite follow you, what you mean by stamp plan. Could you clarify that a little?

Q. You spoke about the S & H stamp plan representative having come to visit with you.

A. Yes.

Q. And attempted to secure your business, is that right? A. Yes, sir.

Q. Do you know whether there are other stamp plans other than S & H stamp plan?

A. Yes, sir.

Q. Do you know the names?

A. There are firms such as Red Stamps, Brown Stamps.

Q. In fact, there are several stamp companies.

A. Yes.

(Testimony of Bert Gordon.)

Q. That have different color stamps and different name stamps, but their purpose is to have the public receive some redemption value on those stamps, is that correct?

A. Ultimately. A lot of them have printing—it is ambiguous what the value is. I don't know.

Q. Have you ever heard of the National Business Promotion Corporation? [19]

A. Yes, sir.

Q. They are a California corporation?

A. I am not sure they are a corporation. They are in California, yes.

Q. Do you know what plan that is?

A. Yes, sir.

Q. Is it similar to the one which the plaintiff is using in this case and the defendant?

A. In what form are you referring to? It is probably incidental, but we also have a court case with them.

Q. May I ask you this? Do you know whether or not they are also using a check form for the distribution of their stamps?

A. Yes, sir.

Q. And the same procedure is used by that corporation for the pasting of stamps upon the back of the check, is that correct?

A. Yes, sir.

Q. Let me ask you this. In what way, Mr. Gordon, is your stamp plan different from the other stamp plans which now exist?

A. Well, first——

The Court: Now, that may be a little confusing, because evidently there are several companies that

(Testimony of Bert Gordon.)

use the check plan, and the check plan may be different from the ordinary [20] plan as used by the Green Stamp Company.

Mr. Caughey: Now, your Honor please, I have looked at the particular check to which Mr. Gordon refers, and I might state that there is now litigation pending against this particular concern for violation of this copyright.

The Court: May I ask the witness a question?

Mr. Caughey: Certainly.

The Court: Do you know when the company was organized that counsel is speaking about?

The Witness: Very well, sir.

The Court: Do you know when it was organized?

The Witness: Yes, sir.

The Court: When?

The Witness: If I may give a little history to the Court, this gentleman, Mr. Brown—is that his name on the check?

Mr. Gordon: The name T. S. Brown appears.

The Witness: Mr. T. S. Brown came to Denver in 1951 seeking a franchise for the State of California and acquired all of our information and came back—this occurred prior to our acquiring control of the company—and after receiving all this information, he came back here and the corporation never heard from him again.

When we started doing business out here, we ran into this situation here where he had copied our

(Testimony of Bert Gordon.)

cash dividend [21] check, and so we filed a lawsuit, I believe it was in 1953, against this company.

The Court: When was the company organized? You said you knew.

The Witness: It had to be organized some time——

The Court: I am not asking when it had to be organized. You don't know?

The Witness: Between 1951 and 1953, sir, in that two-year area.

The Court: All right.

Q. (By Mr. Gordon): Mr. Gordon, of your own knowledge, now, do you know whether your franchise dealer has any dealings with a company called O. K. Baby Shop?

The Court: May I ask a question? According to the testimony of this witness, they came to California and then they organized a corporation. Do you have a franchise? Do you give a franchise to the entire state or to a part of the state to an individual?

The Witness: In California, since it is a large state, we have split it into two or three sections, sir.

The Court: And have you given a franchise to the section around Los Angeles?

The Witness: Yes, sir.

The Court: To whom did you give the franchise?

The Witness: Check System, Incorporated, of San [22] Marino.

(Testimony of Bert Gordon.)

The Court: Of San Marino?

The Witness: Yes, sir.

The Court: When did you do that?

The Witness: I believe it was in November, 1954. They were the second franchise holder in this area. We previously had a franchise holder in 1952, the latter part of 1952.

The Court: Who was he?

The Witness: A partnership composed of Mr. Haymes and Mr. Booth.

The Court: What happened to that franchise? Was it cancelled out or is it still going?

The Witness: They cancelled out.

The Court: When was it cancelled?

The Witness: In 1953.

The Court: Then after you cancelled the franchise with Haymes and Booth, you gave the franchise to the Check System, Incorporated, of San Marino?

The Witness: Yes. We operated ourselves temporarily while we secured a new distributor.

The Court: When you talk about franchise, will you designate who you are talking about? You asked a question about the franchise dealer.

Mr. Gordon: I see what you mean.

Q. Now, Mr. Gordon, the present franchise holder, the [23] Check System Corporation, do you know whether or not they have ever dealt with or had any negotiations for dealing with the O. K. Baby Shop in South Gate?

(Testimony of Bert Gordon.)

A. I myself would be somewhat unable to answer that.

The Court: If you don't know, there is no disgrace in saying you don't know.

The Witness: No, sir.

Q. (By Mr. Gordon): If I were to ask you the same question with respect to these named businesses in South Gate, would your answer be the same? The names I am going to give you are Brad's Bike Shop, Household Hardware & Paint Company, Buc's Union Oil Service, Western Motor Rebuilders, Bill's Quality Meats, Firestone Pottery & Gift Shop, Turnbull Bros. Paint Store, Martin's Cleaning Plant, Parson's Pharmacy, Martin's Radio Center, Layton Rents, and Davis Market?

Mr. Caughey: If your Honor please, unless he can show some materiality of the question, I am going to object.

The Court: If he doesn't know, all he has to say is no.

Mr. Caughey: That's right, but I am objecting to the question before he answers, because I don't think it is proper.

The Court: Overruled.

The Witness: Yes, I have heard of the Davis Market.

The Court: The question is of your own knowledge, [24] not what you have heard. The question was of your own knowledge.

The Witness: Yes, sir, Davis Market.

Q. (By Mr. Gordon): You know there have

(Testimony of Bert Gordon.)

been dealings or negotiations between your present franchise holder and Davis Market, is that correct?

A. You mean where he sold Davis Market?

Q. Where he what?

A. You mean where my franchise holder has sold Davis Market?

Q. He has sold or attempted to sell your system to any of these named persons or firms.

The Court: Do you know what your franchise holder does?

The Witness: Yes, sir. I get a monthly report of their activities and who they sell.

The Court: Well, that's hearsay. Of your own knowledge, now, have you ever called upon any of these parties?

The Witness: Personally, no, sir. The territory is entrusted to our franchise holder and he renders——

The Court: All you know about it is the reports you get from the franchise holder?

The Witness: Yes, sir.

Mr. Gordon: I have no further questions, your Honor. [25]

The Court: Any other questions?

Mr. Caughey: No, sir.

The Court: You may step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Caughey: Mr. Davis.

LEONARD F. DAVIS

one of the defendants, called as a witness by the plaintiff herein, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you be seated and state your name, please?

The Witness: Leonard F. Davis.

Direct Examination

By Mr. Caughey:

Q. Would you please state your name?

A. Leonard F. Davis.

Q. Are you the Leonard F. Davis who is one of the defendants in this action? A. Yes, sir.

Q. I note there is another defendant, Wayne Layton. Do you know Mr. Layton?

A. Yes, sir.

Q. Is he the gentleman sitting in court [26] here? A. Yes, sir.

Q. What association have you with Mr. Layton in a business way?

A. Well, he has a business right across the street from me down a little ways.

Q. Are you and Mr. Layton doing business under the firm name and style of Cash Savings Check Corporation?

A. Yes, sir.

Q. How long have you been engaged——

The Court: May I ask a question here?

Mr. Caughey: Yes, sir.

The Court: Is this a fictitious name? Can they use corporation in a fictitious name?

(Testimony of Leonard F. Davis.)

Mr. Gordon: If your Honor please, it is not a fictitious name. There is a corporation.

The Court: Known as Cash——

Mr. Gordon: Cash Savings Check Corporation, which was incorporated September 12, 1955. The corporation number is 308851. The date is September 12, 1955, being prior to the filing of the commencement of this action.

Mr. Caughey: In view of the statement of counsel, may we have an amendment of the complaint to show that the Cash Savings Check Corporation is a corporation instead of a fictitious name?

The Court: Yes. I never heard of a fictitious name [27] using the word corporation before.

Mr. Gordon: That is correct, your Honor.

The Court: I didn't think it was allowed.

Mr. Caughey: It has been done, sir.

The Court: Has it?

Mr. Caughey: Yes, sir.

The Court: All right. I am learning something new every day.

Mr. Caughey: A lot of companies when they do business as a fictitious firm name will use the corporation name as a fictitious firm name.

Q. Are you associated with the Cash Savings Check Corporation, a California corporation, Mr. Davis? A. Yes.

Q. What is your position with that concern?

A. President.

Q. What is the position of Mr. Layton with that concern? A. Vice president.

(Testimony of Leonard F. Davis.)

Q. Is it a fact that you and Mr. Layton caused this corporation to be formed? A. Yes, sir.

Q. And for the purpose of engaging in the business which the corporation is carrying on?

A. That's right, sir. [28]

Q. What is the business of that corporation?

A. It is—well, we use it for advertising purposes is what we use it for.

Q. What is that?

A. We use it for advertising.

Q. Would you be a little more explicit on what you mean by advertising?

A. We are using the Cash Saving Check Corporation——

Mr. Gordon: If your Honor please, in order to save the time of the court, I have a copy of the articles of incorporation. They certainly will tell what the powers and the purposes of the corporation are.

Mr. Caughey: That is general. I want him to be more specific as to what the corporation is actually doing.

Mr. Gordon: We will stipulate the corporation is actually distributing the check form of cash savings check.

Mr. Caughey: Such as shown in Exhibit 2 to the complaint?

Mr. Gordon: No, sir. Counsel remembers Mr. Davis and I appeared at your office upon the filing of the complaint and we at that time attempted to work out a settlement——

(Testimony of Leonard F. Davis.)

Mr. Caughey: We won't go into that.

Mr. Gordon: But at that time we sent to you a new form of check.

Mr. Caughey: I understand. [29]

Mr. Gordon: Which is now in use.

Mr. Caughey: I will bring that out by the witness.

Q. When did this corporation go into business, Mr. Davis? When did it first engage in business?

A. We started in business, I believe, the last of August, in 1955.

The Court: That is not particularly true, is it? The corporation didn't start in business. The corporation was not organized at that time.

Mr. Gordon: That's right. They were at that time attempting to organize themselves so they could.

The Court: As individuals, you started business in August, is that right, as individuals?

The Witness: Yes.

Q. (By Mr. Caughey): And you continued as individuals doing business until the corporation was formed, is that correct?

A. Well, it was formed before—well, I don't know. I guess legally it isn't formed until the date seal on the corporation.

Mr. Caughey: That is correct.

The Court: What was the date of the corporation?

Mr. Gordon: September 12, 1955, your Honor.

(Testimony of Leonard F. Davis.)

Q. (By Mr. Caughey): So, therefore, for a relatively short time prior to the formation of the corporation, you carried [30] on the business as individuals?

A. As far as any finance or anything like that, no. We just started. We didn't do any business until after we received that.

The Court: May I ask a question?

Mr. Caughey: Yes.

The Court: Did you issue any checks before the corporation was formed? Were there any checks issued or any stamps sold before the corporation was formed?

The Witness: Yes, there was.

The Court: When did you first start to issue the checks or sell the stamps?

The Witness: I believe it was September—no, it was August, right the last of August, sir.

The Court: The latter part of August?

The Witness: Yes.

The Court: Then in September the corporation was formed and the corporation took over all its business?

The Witness: Yes.

The Court: All right.

Q. (By Mr. Caughey): Prior to the time the corporation was formed, the ones who were carrying on the business were Mr. Layton and you, is that correct? A. That's right.

Q. Now, I show you Exhibit 2 to the complaint, Mr. [Davis, which by the pleadings is admittedly a

(Testimony of Leonard F. Davis.)

check which was issued either by the corporation or by you and Mr. Layton prior to the time the corporation was formed. A. Yes, sir.

Q. Do you recognize that check?

A. Yes, sir.

Q. What is it?

A. It is the one we started out with, the check itself.

Q. And you distributed those checks to merchants in South Gate, did you?

A. The ones that are listed there, yes, sir.

Q. The ones that are listed on the check, whose names are printed on the check, is that correct?

A. That's right.

Q. You supplied stamps to those concerns?

A. Yes, sir.

Q. For the purpose of applying the stamps to the back of the check in the space provided for, is that right? A. That's right.

Q. Prior to the time you and Mr. Layton caused this check to be printed or produced, you had knowledge of the activities, did you not, of the plaintiff corporation and its licensees?

A. Now, if I understand you right, you mean by knowing them, or—— [32]

Q. No. You knew what they were doing?

A. No, I did not.

Q. You had never seen any of their checks prior to the time Mr. Layton and you went in business?

A. Oh, yes, I seen the checks.

Q. So you had seen them and you were aware of

(Testimony of Leonard F. Davis.)

the fact they were engaged in this check business in Southern California, were you not?

A. Well, I seen a check. I did not know them personally or the company. I haven't seen many of them.

Q. I did not ask you that. I am talking about the check itself and the fact that you knew they were engaged in business here through their own efforts or through a franchise holder in Southern California.

A. The only way I knew was I happened to get hold of one of them through the Iowa Pork Shop, is all.

Q. What's that? I didn't understand.

A. I was shopping at the Iowa Pork Shop and got hold of one of them, and I thought it was a good idea.

Q. You thought it was a good idea?

A. That's right.

The Court: When was this?

The Witness: That was in around about May or so of 1955.

Q. (By Mr. Caughey): Then you contacted Mr. Layton and [33] told him about it?

A. There was also another one there. There is a Cash Discount Coupon check that they were using, and I looked at both of them, and we used that to help set up this advertising idea that we had.

Q. So that you had this check of the plaintiff corporation available at the time that you made up your check, is that correct? A. That's right.

(Testimony of Leonard F. Davis.)

Q. As a matter of fact, you practically copied it, didn't you?

A. Well, yes, it is about the same. We didn't try to copy it word for word. We used their idea.

Q. You are still engaged, the corporation, the Cash Savings Check Corporation is still engaged in this business; is that correct?

A. That's right.

Q. Are you and Mr. Layton the sole owners of the corporation?

A. No, we are not.

Q. Are there others also that are stockholders?

A. Yes, sir.

Q. Where are you engaged in business, what particular vicinity in Southern California?

A. South Gate. [34]

Q. Just within the city limits of South Gate?

A. Yes.

Q. Do you use this check in your own business, Mr. Davis?

A. Yes, we do.

Q. And the stamps in your own business?

A. Yes.

Q. You operate Davis Markets, do you?

A. That's right.

Q. You have found, have you not, that by the use of this check you have increased your sales considerably?

A. I have increased my sales, yes.

Q. Have you had any contact whatsoever prior to today with any official of the plaintiff corporation?

A. Yes.

Q. Who?

A. I don't know their name, but they came in,

(Testimony of Leonard F. Davis.)

and I believe they said that they had a franchise for Southern California.

Q. When was that?

A. I am not sure of the date, but it was somewhere in October, I believe.

Q. Subsequent to that time, you commenced your operations?

A. Wait a minute. It would have to be before that. It [35] would have to be the first of September, because they served me with the notice in the last part of September, so it had to be the middle of September when they saw me. After that time I never seen any of them.

Q. Has anybody contacted you relative to using this particular check prior to the time you saw the check that you stated, I believe, was in the Oaks Market, or where was it you first saw one of these checks?

A. Iowa Pork Chops.

Q. Had anybody connected either with the plaintiff corporation or any franchise holder or licensee contacted you prior to that time?

A. No, not from this company.

Q. Not from this company? A. No.

Q. Had they from some other company?

A. The Cash Discount Corporation had approached me on it, but that is the only one.

Mr. Caughey: May your Honor please, I might state for the benefit of the court that that corporation which he has now referred to is the defendant in another action pending in this Federal District

(Testimony of Leonard F. Davis.)

and that Mr. Brown is one of the persons who formed that particular corporation.

Q. How long did you use this check, which is exemplified by Exhibit 2 to the complaint, for how long a period of time [36] did you use it?

A. When they served me with the papers, I immediately went to my attorney and showed it to him, and we immediately set up, and I believe we called you before we did anything with the check, and we went ahead and fixed up another check.

Q. For how long a time did you use this particular check, Exhibit 2?

A. It was less than two months.

Q. You mean beginning from the first time, some time in August, that you first used the check, it was approximately two months?

A. About the middle of October we had the other check printed and picked up the others that we distributed before that.

Q. Have you available one of the checks which you are now using?

A. Yes, sir. I believe my attorney has one there.

Q. Can you produce the same?

A. Yes, sir.

Q. Your counsel has submitted a check to me. Is this the one that you have reference to?

A. No. This isn't the one, but this is the same thing, except it has 1956 on it. The other was 1955.

Q. So except for the year, it is the same check which you testified that you changed to some time in the latter part [37] of October or thereabouts?

(Testimony of Leonard F. Davis.)

A. Yes, sir.

Q. And that you used continuously since, is that correct? A. Yes, that's right.

Mr. Caughey: I ask that this check identified by the witness be marked as plaintiff's exhibit next in order.

The Court: It may be marked in evidence.

The Clerk: Exhibit 2.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 2.)

Q. (By Mr. Caughey): Do you consider that the Plaintiff's Exhibit 2 that you have already identified that you previously used was a negotiable check? A. Yes, it is a negotiable check.

Q. And also the check which you identified as Plaintiff's Exhibit 2 is also negotiable?

A. You mean the first one you showed me?

Q. This one I just showed you, the Plaintiff's Exhibit 2. A. Yes, that is negotiable.

Q. That is, it is immediately negotiable when they have put stamps attached to the back, is that right? A. That's right.

Q. And both of those checks are checks which are distributed [38] to merchants and the stamps are distributed to merchants, and then the purchaser of the merchandise from the merchants receives stamps and they are applied on the back of the check until the check is filled up? A. Yes, sir.

Q. Now, you have how many spaces on the back?

(Testimony of Leonard F. Davis.)

A. We have 100.

Q. That is the same number of spaces that the plaintiff corporation has, is it not?

Mr. Gordon: If your Honor please, the question actually is one which is answered by the facts, before the Court.

The Court: The exhibits are the best evidence.

Mr. Gordon: That's right.

Mr. Caughey: That is correct.

Mr. Gordon: I will stipulate each one bears the requirement of 100 stamps.

Mr. Caughey: And at a half cent each——

Mr. Gordon: I don't know how you are going to figure it, but they require 100 stamps and you get \$1.00 for 100 stamps attached to the check.

Mr. Caughey: Right.

Q. Then I assume, Mr. Davis, after the checks have gone through the bank that they are cancelled and returned to you? A. Yes, sir.

Q. Isn't it a fact that you have had some checks returned [39] with stamps of the plaintiff corporation thereon?

A. No, I have not had one returned.

Q. You have never had that happen to you?

A. No.

Q. Have you examined all your returned and cancelled checks with the stamps on?

A. Yes, sir.

Q. You have not had any occasion where there has been any from merchants other than those with whom you were dealing? A. That's right.

(Testimony of Leonard F. Davis.)

Q. What is the extent of the business that you are doing in these checks and stamps attached thereto? Are you familiar with the extent of the business carried on by the corporation?

A. Yes.

Q. Would you please give me to the best of your knowledge the extent of the business, monthly, if you can?

A. That I don't know. I couldn't—it would be an approximate figure. About \$250 or \$300.

The Court: In what time?

The Witness: A month.

Q. (By Mr. Caughey): A month?

A. The sales of stamps themselves.

Q. That is of stamps themselves from the corporation, is [40] that correct?

A. Yes, that's right. That is the gross sales.

The Court: You don't sell the checks, the blank checks?

The Witness: No.

The Court: So the only income is from the sale of stamps?

The Witness: Yes.

The Court: You say that would be what?

The Witness: \$250 to \$300.

The Court: Per month?

The Witness: Per month.

Q. (By Mr. Caughey): To whom do you sell these stamps?

A. The merchants that are in the advertising idea, in with us on that.

(Testimony of Leonard F. Davis.)

Q. You also use the stamps in your own business, is that correct?

A. Well, I consider myself as one of the businesses, yes.

Q. In that \$250 or \$300 a month, did you include the business which you were doing in stamps?

A. That's right, sir.

Q. Your own business?

A. That's right, sir.

Q. Did you or Mr. Layton go out and contact these merchants [41] and cause them to purchase your stamps?

A. Yes, we did.

A. Yes, we did.

Q. In other words, you went out and told them you were putting out this check and explained it to them and asked them to purchase these stamps?

A. Yes.

Q. And you supplied them with the printed checks, is that correct?

A. That's right, to go along with the advertising deal we had planned.

Q. These merchants that you have listed on the checks, Plaintiff's Exhibit 2, are they prominent merchants in South Gate?

A. Yes, sir.

Q. And carry on a substantial business there, is that correct?

A. That's right, sir.

Mr. Caughey: I believe that will be all. [42]

(Testimony of Leonard F. Davis.)

Cross-Examination

By Mr. Gordon:

Q. Mr. Davis, with regard to the check which was introduced as being used by your company now, is that check sold to the dealers or given to them?

A. It is given to them.

Q. Do you sell them anything with the [47] check?

A. No. All we sell is the stamp.

Q. You sell stamps for the checks, is that correct? A. That's right.

Mr. Gordon: I think counsel has seen the stamp.

Q. I have here 10 in number of 1-cent Cash Saving Check stamps. A. That's right.

Q. I will ask you if these are the stamps which you sell to the dealers. A. Yes.

The Court: That may be admitted as Defendants' Exhibit A.

Mr. Gordon: I was only going to have it introduced as an exhibit, not in evidence yet, but just for identification.

The Court: Is there any objection to it?

Mr. Caughey: No.

The Court: In evidence.

The Clerk: Exhibit A.

(The exhibit referred to was received in evidence and marked as Defendants' Exhibit A.)

Mr. Gordon: I have no further questions.

The Court: You may step down.

Mr. Caughey: Just one other question. [48]

(Testimony of Leonard F. Davis.)

Redirect Examination

By Mr. Caughey:

Q. You testified you gave the checks away and sold the stamps? A. Yes.

Q. You gave the checks away for the purpose of having the stamps attached to them, isn't that a fact? A. That's right.

Mr. Caughey: That's all.

Mr. Gordon: Nothing further.

The Court: Step down.

(Witness excused.)

Mr. Caughey: Mr. Beebe, please.

EARL BEEBE

called as a witness by and on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, sir?

The Witness: Earl Beebe, B-e-e-b-e.

Direct Examination

By Mr. Caughey:

Q. Where do you reside?

A. In San Marino.

Q. What is your business? [49]

A. Well, we are engaged in several businesses, but one business is the operating of the Check Sys-

(Testimony of Earl Beebe.)

tem, Inc., a California corporation, distributing these Cash Dividend Savings stamps.

Q. What is your position with the company?

A. I am vice president of the corporation.

Q. Is that a California corporation?

A. Correct, sir.

Q. Do you know when it was organized?

A. To the best of my knowledge, in October of 1954.

The Court: And since that time you have been engaged in this business, have you?

The Witness: Correct, sir.

Q. (By Mr. Caughey): Have you any contractual relations with the plaintiff corporation?

A. We have a contract with the—may I say the parent corporation, whereby they furnish us the checks and the stamps, which we sell to the local dealers. We are operating as their so-called agent in California.

Q. Where do you operate, within what territory?

A. Los Angeles County, Orange County. We have the right to operate in other counties, but we haven't expanded over all the area yet.

Q. Do you operate in the vicinity of South Gate, California? [50]

A. Yes, sir, on all sides and around South Gate.

Q. But not in South Gate?

A. That I would have to look over our records to know what the actual boundaries are. I would assume we have some dealers within the city limits of

(Testimony of Earl Beebe.)

South Gate. I cannot answer that question to my certain knowledge.

Mr. Gordon: If your Honor please, I move to strike after where he says "I assume."

The Court: He says he doesn't know. Denied.

Q. (By Mr. Caughey): You are operating in Huntington Park, are you? A. Right.

Q. That is the adjacent city?

A. I believe so, sir.

Q. Have you ever met Mr. Davis, one of the defendants, who is connected with the defendant corporation? A. I have, sir.

Q. When did you first meet him?

A. Counsel, I would say that was in the latter part of August, 1955.

Q. Where did you meet him?

A. At his place of business.

Q. Did you go there to his place of business?

A. Yes, sir.

Q. Would you state why you went there? [51]

A. May I introduce a point? We have a sales manager, Mr. Benolken, in the area, and as soon as this plan was started, let us say in a week, it might have been more than that, it was called to our attention that we had people operating a system, a plan or idea similar to ours, and we called on these people to call their attention to the fact that we had the copyright on the check and the stamps.

Q. You say "we were." Who do you mean by "we"? A. Mr. Benolken and I.

Q. So you both went there together?

(Testimony of Earl Beebe.)

A. That is correct.

Q. And you talked to Mr. Davis?

A. I think I talked to Mr. Davis. I believe there is a father and son, but I am not certain whether it was this particular Mr. Davis.

Q. You talked to someone in charge?

A. That is correct. I believe it was probably this Mr. Davis. I might add that he was very courteous and we had a very friendly conversation.

Q. In talking to him, did he say whether he was aware of your activities in Southern California?

A. Correct, sir.

Q. He did? A. That's right.

Q. And you told him that you had a franchise in Southern [52] California, did you?

A. We told him we had a contract with the parent company, a franchise for the area.

Q. Do you know Mr. Layton, who is here in the room? A. Yes.

Q. Did you talk to him?

A. Prior to my talking to Mr. Davis.

Q. On the same day?

A. Within an hour or so of each other.

Q. What did Mr. Layton say to you when you talked to him?

A. Substantially that he was a part of the organization, Mr. Davis was president of the organization, and if I wanted to talk to the people that would be in charge, to go see Mr. Davis. I had probably 10 minutes of informal discussion with Mr.

(Testimony of Earl Beebe.)

Layton about our having this copyright and their probable violation of our copyright.

Q. Have you made any attempt to sell your checks or your stamps to any merchant in South Gate who has refused to take the same because of the fact of the existence of this defendant corporation's check, stamps and checks there?

Mr. Gordon: Your Honor please, I object to the question on the ground, first of all, it is ambiguous, and, second, it calls for a conclusion of the witness.

Mr. Caughey: I don't think it is a conclusion at [53] all.

The Court: Overruled. Do you understand the question?

The Witness: Yes, sir.

The Court: Overruled.

The Witness: Counsel, will you please state it again?

The Court: Read the question.

Mr. Caughey: I better reframe the question in view of the objection.

Q. Have you ever had occasion to contact any merchant in South Gate for the purpose of endeavoring to sell your checks and stamps who has refused to do so because of the existence in the territory of the defendant corporation?

Mr. Gordon: Your Honor please, again I will object on the ground it calls for a conclusion of the witness and is hearsay as to what the reasons are for a person's refusing to do business with this man.

The Court: May I put it this way? Have you

(Testimony of Earl Beebe.)

ever called upon anyone down in this particular area relative to purchasing your stamps?

The Witness: I personally, within the city of South Gate, no. In Huntington Park, yes, but our sales manager in South Gate——

The Court: You can't tell what your sales manager [54] did.

The Witness: Okay.

The Court: You didn't call on anybody in South Gate?

The Witness: That's right.

Q. (By Mr. Caughey): Not you personally?

A. That's right.

Q. Just your sales manager?

A. That's right.

Mr. Caughey: That's all.

Mr. Gordon: I have no questions.

The Court: You may step down.

(Witness excused.)

Mr. Caughey: The plaintiff rests, may your Honor please. [55]

* * *

LEONARD F. DAVIS

called as a witness by and on behalf of the defendants herein, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Gordon:

Q. Mr. Davis, I believe you testified upon examination by Mr. Caughey, that you had gotten the idea for the plan or system that you have for the checks from a purchase that you made at the Iowa Pork Shop, is that correct? A. That's right.

Q. What were you given at the Iowa Pork Shop that gave you this idea?

A. They asked me if I was saving the stamps and I said yes.

Q. And they gave you what?

A. When I purchased the merchandise, they gave me these Cash Dividend stamps that they had.

Q. Prior to that time had you been seeking some scheme [56] or plan for advertising, for promotion of your business? A. I had.

Q. Had you been approached by any other persons who sold any schemes or plans for promotion of business? A. Yes.

Q. Do you know who they were?

A. The Blue and Gold Stamp Company approached me, and also the Cash Discount Coupon Company. I guess they are under another name.

Q. They are all stamp saving outfits, is that right? A. That's right.

(Testimony of Leonard F. Davis.)

Q. Did you put any of those into use in your place of business at all? A. No, I didn't.

Q. When was the first time that you actually put the check and the stamp system into your place of business, the Davis Market?

A. I don't know the exact date, but it was in the last part of August. I don't know exactly the day, but it was the last part of the month of August.

Q. The stamps that you were using, are they the same form that you have at the present time?

A. Yes.

Q. The ones that were introduced by Defendants' Exhibit A are the ones that you have always used, is that right? [57] A. That's right.

Mr. Gordon: I have no further questions, your Honor.

Mr. Caughey: No questions.

The Court: You may step down.

(Witness excused.)

Mr. Gordon: The defendant rests, your Honor.

The Court: Any other testimony?

Mr. Caughey: Well, no, sir. I have got the check in.

The Court: The defendant has rested, so I was wondering whether you had any other testimony.

Mr. Caughey: No, sir. I think with that testimony your Honor is able to pass upon the case. [58]

Mr. Caughey * * * The defendants have, with knowledge and access to this particular check, in effect copied it.

The Court: No question in my mind they copied it. No question about it. [60]

Mr. Caughey: Yes, sir.

The Court: They copied it. The only question is, did they have a right to copy it?

* * *

[Endorsed]: Filed August 13, 1956. [61]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 25, inclusive, contain the original

Complaint;

Answer;

Findings of Fact, Conclusions of Law & Judgment;

Notice of Appeal;

Designation of Contents of Record on Appeal;

Order Extending Time to Docket Record on Appeal;

which, together with a full, true and correct copy of the Cost Bond on appeal; 1 volume of reporter's

transcript; and plaintiff's exhibits 1 & 2 and defendants' exhibit A, all in the above-entitled cause, constitute the transcript of record on appeal to the United States District Court for the Ninth Circuit in the above case.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and seal of the said District Court this 13th day of September, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15289. United States Court of Appeals for the Ninth Circuit. Cash Dividend Check Corporation, Appellant, vs. Leonard F. Davis and Wayne Layton, Doing Business Under the Fictitious Firm Name and Style of Cash Saving Check Corporation and Cash Saving Check Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed September 19, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15289

CASH DIVIDEND CHECK CORPORATION, a
Corporation,

Plaintiff-Appellant,

vs.

LEONARD F. DAVIS and WAYNE LAYTON,
Doing Business Under the Fictitious Firm
Name and Style of CASH SAVING CHECK
CORPORATION, and CASH SAVING
CHECK CORPORATION, a California Cor-
poration,

Defendants-Appellees.

CONCISE STATEMENT OF POINTS

The appellant, Cash Dividend Check Corporation, pursuant to the provisions of Rule 17 of the Rules of the United States Court of Appeals for the Ninth Circuit, does hereby designate the following as the concise statement of points upon which it will rely on appeal:

1. That the work exemplified by Exhibit 1 to the complaint embodies subject matter which is entitled to a statutory copyright under the provisions of Title 17, United States Code, § 10.

2. That the work exemplified by Exhibit 1 to the complaint contains original subject matter and secures to the plaintiff a valid statutory copyright

under the provisions of Title 17, United States Code, § 10.

3. That the work exemplified by Exhibit 2 to the complaint embodies original subject matter of plaintiff's statutory copyright and is an infringement thereof.

4. That the work exemplified by Plaintiff's Exhibit 2 embodies original subject matter of plaintiff's statutory copyright and is an infringement thereof.

5. That the Trial Court erred in finding in Finding of Fact V that Plaintiff's Exhibit 1 did not embody subject matter which would entitle it to a valid statutory copyright.

6. That the Trial Court erred in failing to find that Exhibit 2 to the complaint and Plaintiff's Exhibit 2 were infringements of plaintiff's statutory copyright.

7. That the Trial Court erred in finding in Finding of Fact IX that the action of defendants in publishing and distributing the works exemplified by Exhibit 2 to the complaint and Plaintiff's Exhibit 2 have not caused any damage or injury to the plaintiff.

LYON & LYON,

/s/ R. E. CAUGHEY,

Attorneys for Appellant.

[Endorsed]: Filed September 28, 1956.

